Editor's note: 91 I.D. 165; Appealed -- Vacated as precondition for dismissal of Utah Wilderness Assoc. v. Clark C84-0472J (D.Utah, Dec. 16, 1985) and 127 IBLA 331, 100 I.D. 370 (Oct. 19, 1993); Vacated by Order dated Feb. 26, 1986 -- See 80 IBLA 88A below. -- no longer to be cited -

UTAH WILDERNESS ASSOCIATION

IBLA 83-356 Decided March 30, 1984

Appeal from decision of the Moab, Utah, District Office, Bureau of Land Management, dismissing protest against issuance of a right-of-way grant to Shell Oil Company, U-50162, through the Road Canyon Wilderness Study Area.

Affirmed as modified.

1. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Appeals--Federal Employees and Officers: Generally--Federal Employees and Officers: Authority to Bind Government--Rules of Practice: Appeals: Generally--Secretary of the Interior

   A decision by an officer of the BLM which does not fall within any of the enumerated exceptions in 43 CFR 4.410 is subject to appeal to the Board of Land Appeals and a BLM officer is without authority to state otherwise.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Generally--Wilderness Act

   An appellant seeking reversal of a decision denying a protest against issuance of a right-of-way across land in a wilderness study area to state owned land must show that the decision was premised either on a clear error of law or a demonstrable error of fact. Where state land is encircled by Federal land within a wilderness study area, the state's lessee has a right of access across Federal land pursuant to 16 U.S.C. § 3210(b) (Supp. V 1981) adequate to secure the reasonable use and enjoyment of the leasehold. Because the BLM may not deny such access by requiring the lessee to

use helicopters, BLM need not examine the feasibility of helicopter access in its consideration of a right-of-way application.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

A determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes environmental problems have been considered, relevant areas of environmental concern have been identified, and the determination is reasonable.

APPEARANCES: Gary MacFarlane, staff member, Utah Wilderness Association, for appellant; David K. Grayson, Esq., Assistant Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Utah Wilderness Association appeals from the decision of the Moab, Utah, District Office, Bureau of Land Management (BLM), dismissing appellant's protest against the issuance of a road right-of-way to Shell Oil Company (U-50162) across land in the Road Canyon Wilderness Study Area (WSA) to land leased by Shell from the State of Utah. Access to the state lands is possible only through the Federal lands included in the WSA. Appellant contends the Shell project, involving the drilling of an oil exploration well, will impair the wilderness characteristics of the WSA, that BLM did not adequately evaluate alternatives to the proposed action, and that an environmental impact statement must be prepared.

[1] At the outset, we must correct the District Manager's unauthorized statement that his denial of appellant's protest was not subject to appeal. This Board, not the District Manager, is the arbiter of its jurisdiction, pursuant to provision of 43 CFR 4.410. The Moab District Manager is bound by law to conduct adjudications in accordance with this regulation. Since his decision does not fall within any of the exceptions enumerated in 43 CFR 4.410, it is subject to appeal and the District Manager is without authority to state otherwise. Nevertheless, we will discuss the reasons given by the District Manager in his decision for denying its appealability:

> The decision to allow access is not a discretionary action on the part of the Department because the discretion has been removed by the Federal Court in the Cotter decision. Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979). Further, the Board is an administrative body and cannot supersede or overrule a Federal Court decision.

(Decision dated Dec. 23, 1982, at 3).

The Cotter decision (Utah v. Andrus, supra), did not order the District Manager to issue the present right-of-way to Shell, nor does it appear Shell was a party to that case. The court in Utah v. Andrus, supra, held that where state land is encircled by Federal land within a WSA, the activity of the state's lessee may be regulated so as to prevent wilderness impairment, but such regulation cannot be so restrictive as to constitute a taking. The decision does not require the Department to issue a right-of-way for a road across a WSA unless the applicant has shown that no feasible alternative exists. Under 43 CFR 4.410, a BLM determination that no feasible alternative

exists is subject to review by this Board. Nothing in Utah v. Andrus, supra, suggests otherwise.

The fact that an action may be described as "nondiscretionary" provides no basis for denying a right of appeal to this Board. For example, the owner of a valid mining claim is entitled to a patent upon proper application, and the Department has no authority to deny it. See Cameron v. United States, 252 U.S. 450, 454 (1920); Roberts v. United States, 176 U.S. 221, 231 (1900); United States v. Kosanke Sand Corp., 12 IBLA 282, 290-91, 80 I.D. 538, 542 (1973); United States v. O'Leary, 63 I.D. 341 (1956). Indeed, issuance of a mineral patent is arguably more "nondiscretionary" than the issuance of this right-of-way to Shell, because the Department has authority to impose terms and conditions to mitigate the adverse environmental effects of a right-of-way. See Utah v. Andrus, supra. The Department has no authority, however, to subject a mining claim patent to such conditions. See United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977), aff'd, South Dakota v. Andrus, 462 F. Supp. 905 (D.S.D. 1978), aff'd, 614 F.2d 1190 (8th Cir.), cert. denied, 449 U.S. 822 (1980). If the Moab District Manager were correct in his view that there can be no appeal from a decision involving such a "nondiscretionary" matter, BLM would be unable to appeal a decision by an Administrative Law Judge directing the issuance of a patent for a mining claim. However, just as this Board has authority to review a determination of the validity of a mining claim for which a patent application has been filed, the Board has the authority to review the Moab District Manager's decision in this case. The plenary power of this Board to review such "nondiscretionary" matters has been judicially recognized. Ideal Basic Industries Corp. v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976).

Although the Board cannot supersede or overrule a court's decision, a single decision by a district court does not always constitute a precedent the Department considers itself obliged to follow. See generally 21 C.J.S. Courts § 186(f) (1940). In Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 383 (D.C. Cir. 1983), the court acknowledged that an agency "is not required to conform its rulings to every decision by a court of appeals." The concurring opinions expressly agreed with this statement. Id. at 384-85. Thus, the fact that the Department does not appeal an adverse district court decision does not necessarily mean that the Department has acquiesced in the court's ruling as precedent, although that decision does become the law of the specific case and the Department may be collaterally estopped from litigating the issue in other cases involving the same party. See United States v. Stauffer Chemical Co., ___ U.S. ___, 104 S. Ct. 575 (1984). For example, in Gretchen Capital, Ltd., 37 IBLA 392 (1978), the Board expressly declined to follow as precedent one unappealed district court ruling. Moreover, for reasons explained below, the Cotter decision is not the principal authority governing disposition of this appeal.

[2] An appellant seeking reversal of a decision involving lands in a WSA must show the decision was premised either on a clear error of law or a demonstrable error of fact. Southwest Resource Council, Inc., 73 IBLA 39 (1983); see John W. Black, 63 IBLA 165 (1982); Union Oil Co. (On Reconsideration), 58 IBLA 166 (1981). Appellant contends that BLM failed to give adequate consideration to helicopter access as an alternative to issuance of a right-of-way. The Board agrees that no consideration of helicopter access is necessary because the State of Utah and its lessee have a right of land access

to the inholding. This Board, however, is not unanimous concerning the legal authority upon which this right is based. 1/

1/ The concurring opinion accepts the Cotter decision as the authority which governs the disposition of this appeal and construes it as recognizing a right of land access to state inholdings, regardless of the feasibility of helicopter access, although requiring consideration of feasibility of helicopter access in determining the access rights of other inholders. The majority do not construe Cotter as precluding consideration of the feasibility of helicopter access for any inholder and find that BLM was required to consider that question if Cotter governed this appeal. However, we find that BLM's analysis provided a sufficient basis for denial of appellant's protest.

Because the Cotter decision compared such access rights to easements by way of necessity, id. at 1009, one may reasonably contend that BLM would not be required to allow land access if helicopters would provide access sufficient to negate the necessity for land access. Although we are aware of no reported judicial decisions which directly hold that the availability of aerial access is sufficient to negate the necessity giving rise to the easement, this Board once noted that even if an inholder could assert the doctrine of easement by way of necessity, the feasibility of the inholder's use of helicopters prevented such an easement from arising. Sun Studs, Inc., 27 IBLA 278, 293-94, 83 I.D. 518, 525 (1976). In Tovrea v. Trails End Improvement Ass'n, 130 Ariz. 108, 634 P.2d 396 (Ariz. App. 1981), the court affirmed a trial court's determination that the private developers of a communications site could not construct the road without violating the provisions of a county ordinance, and the fact that they were exercising the power of eminent domain did not excuse them from having to comply with the ordinance which denied them land access to the site. The court also stated:

"We note that appellants are not precluded from using the peak as a radio and television facility. The trial court found that it could be erected by the use of helicopters. The record also reflects that helicopters have been used for building such facilities in other cases. In view of our disposition, we need not decide the reasonableness of this finding, nor the trial court's conclusion that any road built by the appellants would be open for public use."
Id. at 397, n.2.

Were we to apply the Cotter decision, we would treat the feasibility of helicopter access as an issue of fact in each case. In light of the Tovrea and Sun Studs decisions, however, we would not find that helicopters would provide reasonable access unless evidence established that helicopters had been successfully used for the purpose proposed by the inholder. Under the Cotter decision, BLM's responsibility to consider helicopter access ended when it found helicopters had not been used for oil drilling in the region and would have to be imported. Appellant has provided no evidence that helicopter access would be feasible. Indeed, Congressional recognition of the limitations that could be imposed on inholders' access rights under the Cotter decision prompted the enactment of legislation that supersedes Cotter as authority governing the disposition of this appeal. Such legislative concern points to the correctness of our narrower interpretation of the Cotter decision.

In 1980, Congress enacted the following provision as section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (Supp. V 1981):

> (b) Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the Secretary shall provide such access to non-federally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof; Provided, That such owner comply with rules and regulations applicable to access across public lands. [Emphasis added.]

Subsection (a) of this same statute makes similar provision for land "within the boundaries of the National Forest System." In view of the definition of "public lands" as "land situated in Alaska, which * * * are Federal lands," 16 U.S.C. § 3102(3) (Supp. V 1981), it would initially appear that this provision has no applicability to land in Utah. On the other hand, the subsection itself defines the term "public lands" as land "managed by the Secretary under the Federal Land Policy and Management Act of 1976," and this definition, which would give the term nationwide scope, arguably may be given priority over the definition appearing at 16 U.S.C. § 3102(3) (Supp. V 1981). This ambiguity at least is sufficient to warrant consideration of legislative history in order to ascertain legislative intent as to the scope of the provision.

In Montana Wilderness Association v. U.S. Forest Service, 655 F.2d 951 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982), the court made an exhaustive analysis of the legislative history of section 1323 and concluded it had nationwide applicability with respect to land in the national forest system.

The court, however, began its analysis by presuming that the provision was limited to Alaska:

> As the parties agreed at oral argument, however, § 1323(b) is in pari materia with § 1323(a). The two subsections are placed together in the same section, and use not only a parallel structure but many of the same words and phrases. The natural interpretation is that they were meant to have the same effect, one on lands controlled by the Secretary of Agriculture, the other on lands controlled by the Secretary of the Interior. Since we assume that § 1323(b), by definition of public lands in § 102(3), applies only to Alaskan land, we face a presumption that § 1323(a) was meant to apply to Alaska as well.
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> That interpretation is supported by a review of the entire Act which discloses no other provision having nation-wide application. We therefore conclude that the language of the Act provides tentative support for the view that § 1323(a) applies only to national forests in Alaska. Bearing in mind that "[a]bsent a clearly expressed legislative intent to the contrary, [the statutory] language must ordinarily be regarded as conclusive," Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980), we turn to the legislative history. [Footnote omitted.]

Id. at 954-55. The court described the legislative history as "surprisingly sparse," id. at 955, and most of it is summarized or quoted verbatim in the margin of the court's opinion. After reviewing the history, the court concluded that it "gives only slight support at best to the appellees' interpretation that § 1323 applies nation-wide." Id. at 957. Then the court considered one additional item:

> The appellees, however, have uncovered subsequent legislative history that, given the closeness of the issue, is decisive. Three weeks after Congress passed the Alaska Lands Act, a House-Senate Conference Committee considering the Colorado Wilderness Act interpreted § 1323 of the Alaska Lands Act as applying nationwide:
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> > Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned

> lands within national forest wilderness areas in Colorado. The House bill has no such provision.
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> The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act.
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> H.R.Rep.No.1521, 96th Cong., 2d Sess., 126 Cong.Rec. H11687 (daily ed. Dec. 3, 1980) (emphasis supplied).

This action was explained to both Houses during discussion of the Conference Report. See 126 Cong.Rec. S15571 (daily ed. Dec. 4, 1980) (remarks of Sen. Hart); Id. at S15573 (remarks of Sen. Armstrong); Id. at H11705 (daily ed. Dec. 3, 1980) (remarks of Rep. Johnson). Both houses then passed the Colorado Wilderness bill as it was reported by the Conference Committee.

Although a subsequent conference report is not entitled to the great weight given subsequent legislation, Consumer Product Safety Commission v. GTE Sylvania, 477 U.S. 102, 118 n.13, 100 S.Ct. 2051, 2061 n.13, 64 L.Ed.2d 766 (1980), it is still entitled to significant weight, Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 100 S.Ct. 800, 814, 63 L.Ed.2d 36 (1980), particularly where it is clear that the conferees had carefully considered the issue. See Consumer Product Safety Commission, supra, at 120, 100 S.Ct. at 2062; Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944). The conferees, including Representatives Udall and Sieberling and Senator Melcher, had an intimate knowledge of the Alaska Lands Act. 11/ Moreover, the Conference Committee's interpretation of § 1323 was the basis for their decision to leave out an access provision passed by one house. In these circumstances, the Conference Committee's interpretation is very persuasive. We conclude that it tips the balance decidedly in favor of the broader interpretation of § 1323. * * * We therefore hold that Burlington Northern has an assured right of access to its land pursuant to the nation-wide grant of access in § 1323. [Footnote 12 omitted.]

11/ The participation of Representative Udall is particularly noteworthy since he was the one congressman to proclaim in the legislative history of the Alaska Lands Act that § 1323 applied only to Alaska. [126 Cong. Rec. H 10549 (daily ed. Nov. 12, 1980.]

The concurring opinion accepts the court's holding that subsection (a) applies nationwide but rejects a similar holding as to subsection (b) because

the term "public lands" is considered to be limited to Alaska by the definition appearing at 16 U.S.C. § 3102(3) (Supp. V 1981). Indeed, such a definition is controlling except where obvious incongruities in the statute are created, or where one of the major purposes of the legislation would be defeated or destroyed. See Lawson v. Suwannee Fruit and Steamship Co., 336 U.S. 198, 201 (1949); 1A Sutherland, Statutory Construction § 27.02 (C. Sands 4th ed. 1972); 82 C.J.S. Statutes § 315 (1953). However, giving subsections (a) and (b) of section 1323 different scope is precisely the sort of incongruity that warrants close examination of the legislative history for clear evidence that such a result was in fact intended.

Another consideration militates against automatic application of the statutory definition. The fact that section 1323 inexplicably overlaps with more precisely drafted provisions for easements in other sections of ANILCA suggests that it may have been tacked onto ANILCA with little conscious attention as to how it would affect or be affected by other portions of that Act. 2/ In such a circumstance, it is far more likely that Congress intended subsections (a) and (b) to have similar scope, and one should resist any other determination in the absence of clear evidence that Congress consciously chose otherwise. Courts are not unfamiliar with the difficulty in construing legislation that is assembled piecemeal. When confronted with such legislation, one court observed:

> [R]ather than showing a conscious choice on the part of Congress, it seems more likely that the final product was a result of the

2/ The addition of section 1323 to ANILCA and its relationship to other access provisions is discussed in Montana Wilderness Ass'n v. U.S. Forest Serv., supra at 954-55, nn.4-5.

> two bills being tacked together without any thought being given to this small difference in their wording. Allowance must sometimes be made for human error and inadvertence in drafting legislation. Citizens to Save Spencer County v. United States Environmental Protection Agency, 600 F.2d [844, 871-72 (D.C. Cir. 1979)].

United States v. Stauffer Chemical Co., 684 F.2d 1174, 1186 (6th Cir. 1982), aff'd on other grounds ___ U.S. ___, 104 S. Ct. 575 (1984); accord, Stauffer Chemical Co. v. EPA, 647 F.2d 1075 (10th Cir. 1981); 3/ see also, Cass v. United States, 417 U.S. 72, 83 (1974). 4/

Our review of the legislative history persuades us to reject the view that subsection (a) applies nationwide but subsection (b) is limited to Alaska. We find no basis for concluding that these parallel provisions in fact diverge. While the court in Montana Wilderness Association found that the legislative history of section 1323 itself (as distinguished from that of

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3/ The Stauffer cases concerned a statutory provision that inspection of stationary sources of air pollution could be conducted by an "authorized representative" of the administrator of the Environmental Protection Agency. Provisions of the same statute specified that other inspections could be conducted only by officers or employees of the agency, and the agency believed that because of the difference in wording, the term "authorized representative" could include employees of private contractors. The courts rejected the agency's argument, attributing the difference in wording to inadvertence. The Supreme Court affirmed the 6th Circuit's decision only on the basis of collateral estoppel, holding that EPA was bound by the result of its litigation against the same party which had culminated in the 10th Circuit Court's opinion.

4/ In Cass v. United States, supra, a nearly unanimous Court (one justice dissented) held that a reservist must serve a minimum of 5 full years of continuous active duty before his involuntary release in order to qualify for readjustment of benefits. The court rejected the argument that a reservist who served more than 4-1/2 but less than 5 years could qualify, despite the fact that the subsection of the law establishing the 5-year eligibility requirement was expressly made subject to a provision by which more than 6 months of service would be counted as a whole year. On the basis of its examination of the legislative history, the court determined that this "rounding" provision applied only to determining the amount of pay and was inapplicable to the determination of eligibility.

subsequent legislation) did not provide much help in resolving the issue of whether the section has nationwide scope or is limited to Alaska, we note that that legislative history clearly supports the conclusion that these two subsections have the same scope, whatever that scope might be. The Senate report makes it unarguably clear that inholders are to have the same rights of access without regard to whether their inholdings are surrounded by public land or national forest:

> This section is designed to remove the uncertainties surrounding the status of the rights of the owners of non-Federal lands to gain access to such lands across Federal lands. It has been the Committee's understanding that such owners had the right of access to their lands subject to reasonable regulation by either, the Secretary of Agriculture in the case of national forests, or by the Secretary of the Interior in the case of public lands managed by the Bureau of Land Management under the Federal Land Policy and Management Act of 1976. However, a recent District Court decision in Utah (Utah v. Andrus et al., C79-0037, October 1, 1979, D.C. Utah) has cast some doubt over the status of these rights. Furthermore, the Attorney General is currently reviewing the issue because of differing interpretations of the law by the Departments of Agriculture and the Interior.
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> The Agriculture Department believes that non-Federal land owners have the right of access to national forest lands subject to reasonable rules and regulations. They find nothing in the Organic Act of 1897 (16 U.S.C. 473-478, 479-482, 551) or the Wilderness Act which precludes such access. In fact, they interpret Section 5(a) of the Wilderness Act (16 U.S.C. 1131-1136) as mandating access to non-Federal inholdings within national forest wilderness.
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> The Interior Department on the other hand, interprets Section 5(c) of the Wilderness Act as expressly authorizing denial of access to such inholders in wilderness areas. Based on that interpretation, Interior then concludes that the provisions for wilderness review of public lands organized by BLM in section 603(c) of the Federal Land Policy and Management Act also authorized denial of access across public lands subject to wilderness review.
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> The Committee amendment is designed to resolve any lingering legal questions by making it clear that non-Federal landowners

> have a right of access [across] National Forest and public land, subject, of course, to reasonable rules and regulations.

S. Rep. No. 96-413, 96th Cong., 2nd Sess. 310, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5254.

Moreover, the above-quoted portion of the report shows that the legislation should be construed as confirming existing rights of access rather than as creating new ones. It is quite plain that by enacting the provision, Congress intended to correct perceived errors in judicial and administrative decisions that "cast some doubt over the status of these rights" or "authorized denial of access across public lands subject to wilderness review." The Senate had no difficulty with the Agriculture Department's views which accord needed access rights to forest inholders. The decisions Congress targeted for correction involved public lands outside of Alaska, and specifically included the decision relied upon by the concurring opinion. 5/

5/ Thus, one can agree with the concurring opinion's view of the scope of subsection (b) only if one accepts the proposition that this provision was ineffective to accomplish its primary purpose. Furthermore, this approach does nothing to "resolve any lingering questions about the status of access rights." On the contrary, it compounds those questions. Although the legislation was intended to confirm existing access rights so that the rights of forest inholders would not differ from those of public land inholders, the analysis proposed by the concurrence would retain this distinction with respect to inholders outside of Alaska. The concurrence also contends that application of the FLPMA definition of "public lands" raises more questions than it answers. It notes that:

"FLPMA only applies to lands managed by BLM. Thus, any lands managed by either the National Park Service or the Fish and Wildlife Service would not be included within the scope of section 1323(b). ANILCA, however, has no language in its definition of 'public lands' which would limit its applicability dependent upon which entity was the administering agency." Infra at 82. This overlooks the fact that section 1323(b) affects "public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976." Therefore, this particular subsection does not extend to land managed by any agency other than BLM.

Consequently, Shell has a right of access to the state land in section 36 by virtue of section 1323(b) of ANILCA. Because BLM may not deny Shell access by requiring use of helicopters, BLM was not required to examine the feasibility of helicopter access in its consideration of Shell's right-of-way application.

Appellant contends that BLM failed to consider "alternative access roads, the combination of helicopters and low-standard non-bladed 4 wheel drive route, or * * * the feasibility of using balloons as is done in logging operations in the Pacific-northwest." Appellant has failed to demonstrate that further consideration of these alternatives would require reversal of the decision. Any alternative involving a road would cause similar impairment of the WSA. Although not shown in the environmental analysis, the record on appeal shows BLM did consider various routes. BLM did not select the route proposed by Shell in its application, but required Shell to use a route which "would least impair the wilderness suitability of Road Canyon. It also avoids an archaeological site in the middle of the county road which would have been impacted if a route along the ridge or east side were selected" (Memorandum by Brian Wood, BLM Natural Resource Specialist, dated July 1, 1982).

Appellant correctly contends the proposed action would violate wilderness impairment criteria, as BLM acknowledged in its decision. However, in

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fn. 5 (continued)

Similarly, the objection is raised by the concurrence that the definition of "public lands" in ANILCA contains certain exceptions which would not pertain if the FLPMA definition were substituted. The significance of these exceptions diminishes, however, when one recognizes that Congress intended to confirm existing rights of access which it presumed had already arisen without regard to the exceptions stated in ANILCA's definition of public lands.

Utah v. Andrus, supra at 1009, the court expressly rejected the argument that violation of wilderness impairment criteria would be a valid basis for denying necessary access. Furthermore, Congress itself has made it clear that wilderness management criteria provide no basis for denying an inholder reasonable access across public land.

[3] This Board also rejects appellant's contention that an environmental impact statement is required. Generally, a determination that a proposed action will not have a significant impact on the environment will be affirmed on appeal where the record establishes that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. Southwest Resource Council, Inc., supra. The decision on review meets those standards. Appellant has fallen short of its burden of establishing a demonstrable error of fact in the decision below.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

While I agree with the majority that the dismissal of the protest should be sustained, I reach this conclusion through an analysis substantially different from that presented in the lead opinion. The lead opinion concludes on the basis of the Ninth Circuit Court's opinion in Montana Wilderness Ass'n v. U.S. Forest Service, 655 F.2d 951 (1981), that Shell Oil Company's right of access is protected by section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (Supp. V 1981). Proceeding from this assumption, the majority then concludes, based on an analysis of the legislative history of this provision, that it was intended to overrule the decision of the Utah District Court in the Cotter case (Utah v. Andrus, 486 F. Supp. 995 (1979)), to the extent that the Court held that provision of helicopter access might fulfill the Government's obligation to provide access to both State and private inholdings. I remain unconvinced that either the premise or the conclusion is correct.

First of all, it is clear that the Ninth Circuit did not hold in Montana Wilderness Ass'n v. U.S. Forest Service, supra, that section 1323(b) of ANILCA was nationwide in scope. Indeed, it expressly noted that "[s]ubsection (b), therefore, is arguably limited by its terms to Alaska, though we do not find it necessary to settle that issue here." Id. at 954 (emphasis supplied). Thus, while the majority's holding on this point is assertedly premised on the court's analysis, it is clear that the court, itself, expressly chose not to rule on the question herein decided, and, in fact, intimated that the opposite conclusion might obtain.

The majority reaches its conclusion based on two separate points. First, it heavily relies on the statement of the court that the parties to the appeal were in agreement that section 1323(a) was to be read in pari materia with section 1323(b). Pointing out that the court ultimately concluded that section 1323(a) was, in fact, applicable on a nationwide basis, the majority then reasons that since the two provisions are to be construed in pari materia, section 1323(b) must likewise apply nationwide. The obvious problem with this approach is that the court which decided Montana Wilderness was well aware of its ultimate conclusion as to section 1323(a), yet it not only explicitly eschewed arriving at the conclusion of the lead opinion herein, it indicated that, in fact, the scope of section 1323(b) might well be limited solely to Alaska. The reason for its reluctance to extend the scope of section 1323(b) lay in the exact wording of the section. Thus, section 1323(b) provided:

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Interior may prescribe, the Secretary shall provide such access to non-federally owned land surrounded by public lands managed by the Secretary under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-82) as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to access across public lands.

The key phrase in the court's analysis is the requirement that the Secretary provide access to non-Federally owned land surrounded by public lands. As the court noted, section 102(3) of ANILCA provided that as used in the Act "public lands" means "land situated in Alaska which, after the date

of enactment of this Act, are Federal lands * * *." 1/ One difference between section 1323(a) and section 1323(b) is that the former does not use the phrase "public lands" while the latter does. Thus, regardless of whether or not the two sections should be read in pari materia, it is still possible to apply section 1323(a) nationwide and limit section 1323(b) to Alaska.

The majority attempts to avoid this problem by focusing on the phrase immediately following "public lands," to wit, "managed by the Secretary under the Federal Land Policy and Management Act of 1976 [FLPMA]." Thus, the majority argues that despite section 102(3) of ANILCA, public lands as used in section 1323(b) is defined by reference to the public lands definition employed in section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1976), which defines "public lands" as

> any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except--
>
> (1) lands located on the Outer Continental Shelf; and
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> (2) lands held for the benefit of Indians, Aleuts, and Eskimos. [Emphasis supplied.]

Applying the FLPMA definition, however, raises more questions than it answers. Indeed, as I shall show, utilization of the FLPMA definition of

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1/ It is useful to point out that Congress expressly provided that the definitions found in section 102 would not apply to Titles IX and XIV of ANILCA, instead providing that the terms defined in section 102 would have the same meaning as in the Alaska Native Claims Settlement Act and the Alaska Statehood Act when employed in those two titles. If Congress had intended to apply the definition of "public lands" used in FLPMA in the context of section 1323(b) it could easily have made similar provision for that eventuality in this section.

"public lands" might actually serve to restrict the applicability of section 1323(b) insofar as Alaska is concerned, while at the same time expanding it with regard to the rest of the country.

First of all, FLPMA only applies to lands managed by BLM. Thus, any lands managed by either the National Park Service or the Fish and Wildlife Service would not be included within the scope of section 1323(b). ANILCA, however, has no language in its definition of "public lands" which would limit its applicability dependent upon which entity was the administering agency. The effect of applying the FLPMA definition of "public lands" rather than the ANILCA definition might be to actually constrict the applicability of this provision in Alaska. 2/

Second, the ANILCA definition of "public lands" itself had certain exceptions, excluding therefrom, inter alia, lands selected by the State which had been either tentatively approved or validly selected. No such exclusion exists in section 103(e) of FLPMA. Thus, use of the FLPMA definition might well make certain lands selected by the State subject to section 1323(b) which would not be subject under the ANILCA definition of "public lands."

There is no justification in either the language of section 1323(b) or in its legislative history for suddenly applying a different definition for

2/ Admittedly, the applicability of section 1323(b) to national parks, even in Alaska, would be dependent upon an interpretation of the phrase "managed by the Secretary under [FLPMA]" since this might limit the scope of section 1323(b) only to BLM lands in Alaska. This, however, is a question more properly explored when it is directly presented by an appeal.

"public lands" when used in that section than that applied elsewhere throughout the Act. Indeed, as the court noted, "The legislative history concerning § 1323 is surprisingly sparse" and such that does exist "gives only slight support at best to the appellee's interpretation that § 1323 applies nationwide." Id. at 955, 957. It is important to keep in mind that the evidence which led the court to its conclusion that section 1323(a) was to be applied nationwide involved a conference report on the Colorado Wilderness Act, which was passed 3 weeks after ANILCA. The court cited the relevant portion of the House Report:

> Section 7 of the Senate amendment contains a provision pertaining to access to non-Federally owned lands within national forest wilderness areas in Colorado. The House bill has no such provision.
>
> The conferees agreed to delete the section because similar language has already passed Congress in Section 1323 of the Alaska National Interest Lands Conservation Act. [Emphasis supplied by the court.]

Id. at 957 (citing H.R. Rep. No. 1521, 96th Cong., 2d Sess., 126 Cong. Rec. H11687 (daily ed. Dec. 3, 1980)).

It was on the basis of this subsequent legislative history that the court decided that section 1323(a) was to be applied nationwide. What is important to point out, however, is that this legislative history deals only with national forest lands and does not really address the problem before the Board as to whether section 1323(b), which relates to public lands, is similarly nationwide in scope.

It may be that a court will one day determine that section 1323(b) does apply nationwide. I think, however, that this Board should be reluctant to so interpret the section as an initial matter, particularly where such an interpretation requires that we ignore the plain meaning of the language used.

The majority also suggests that the effect of this provision, assuming that it is nationwide in scope, is to overrule the decision of the Utah District Court in the Cotter case. Since it is my view that this provision should be limited in applicability to Alaska until such time as a court might decide to expand its scope, it necessarily follows that the Cotter decision has not been overruled insofar as "public lands" in the lower 48 states is concerned. Nevertheless, it is also my view that when the Cotter decision is correctly analyzed, it holds that, insofar as lands clearlisted to a State are concerned, provision of helicopter access does not meet the United States' obligation to provide access to state inholdings.

One of the problems which arises in analyzing the Cotter decision is that it involved two separate issues: (1) the authority of BLM to regulate or prohibit access to State school lands, and (2) the authority of BLM to regulate or prohibit access to mining claims located on Federal lands. The court developed two discrete lines of analysis. First of all, with reference to State lands, it noted that contrary to the general rules of interpretation relating to Government grants, school land grants were construed liberally in favor of the grantee. Relying on the nature of the compact between the States and the Federal Government, which included a waiver of all other claims to Federal domain, it held that:

> The State must be allowed access to the state school trust lands so that those lands can be developed in a manner that will provide funds for the common schools. Further, because it was the intent of Congress to provide these lands to the state so that the state could use them to raise revenue, * * * the access rights of the state cannot be so restricted as to destroy the lands' economic value. That is, the state must be allowed access which is not so narrowly restrictive as to render the lands incapable of their full economic development. [Emphasis supplied; citation omitted.]

486 F. Supp. at 1009.

This must be contrasted with the rights of those who had mining claims on the Federal lands. While the court agreed that Cotter had a right of access to its claims on Federal lands, it held that such a right could be more strictly regulated than access to state lands. In the course of this discussion, however, the court at one point commingled consideration of state and Federal lands. Thus, it stated:

> To further complicate the case, it is not clear that the entire proposed road is necessary for Cotter to gain access to section 36. 22/ This is important because different criteria may be applied to judge the propriety of regulation of state, as opposed to federal, access rights. It may be that requiring helicopter access to section 36 would be sufficiently expensive so as to render minerals on that section incapable of economic development. Therefore, requiring such access and denying land access would violate the intent of the school trust grant. It may be, however, that requiring such access to federal claims would not be so expensive as to constitute a taking under 701(h). If the entire road is not necessary to gain access to section 36, then it could be that substantial parts of it could be prohibited while other parts could not. Unfortunately, on the record as it now stands, this matter is far from clear. [Emphasis supplied.]

Id. at 1010-11.

There is no question that the portion of the decision underlined above lends arguable support to the assumption that consideration of helicopter access is relevant insofar as access to state lands is concerned. The problem is that two other sections of the court's decision contradict this conclusion. Thus, footnote 22 states:

> Cotter has asserted that because of the section's terrain it cannot cut across the section. Rather, it must enter from two points: one on the north, the other on the south. * * * This is, however, a mere conclusory allegation. Without further information it is impossible to know whether it would be more expensive to cut through section 36 from north to south, prohibitively expensive, or physically impossible to do so. Even if it would be physically impossible, there still remains the question of whether access to one portion of the section is sufficient to prevent an abrogation of Utah's access rights.
>
> It is also true that the parties stipulated that the proposed road was the only feasible route to the federal claims and section 36. It is not clear from this stipulation, however, that the United States agreed that the entire road was necessary to gain access to section 36 alone. [Emphasis supplied.]

Id. at 1010 n.22.

I think that the thrust of this footnote was that, the discussion in the text notwithstanding, the State had to be given some land access to its land in section 36. This conclusion is strengthened by the court's ultimate order in the case:

> IT IS HEREBY ORDERED, ADJUDGED, DECREED AND DECLARED that the State of Utah, and Cotter Corporation as its lessee, have a right of access to state school section 36 * * *. That right is subject to reasonable regulation by the United States Department of the Interior to prevent impairment of wilderness characteristics, but without damaging the competitive economic development

> of it. The United States may not, in carrying out such regulation, prohibit access. But the United States may, within the limits of the state school land grants and the Due Process Clause of the Fifth Amendment, review and regulate the proposed nature and location of access roads. [Emphasis supplied.]

Id. at 1011.

This must be contrasted with the next section of the court's decree which dealt with access by Cotter to its mining claims on Federal lands. At the end of its judgment, the court stated: "But the United States may, within the limits of the Due Process Clause of the Fifth Amendment, prescribe the mode of access and the location of access roads, if any." Id.

Reading the court's decision in its totality, I think the conclusion is inescapable that the discussion in the text relating to helicopter use was relevant not to imply that access to state lands could be limited to helicopter use, but that different standards of review were necessary in distinguishing between permissible regulation of access to state lands vis-a-vis mining claims located on Federal lands. Conceptually, it is even hard to see how BLM provides a right of access to state school sections by permitting helicopter use. Unlike mining claims located on Federal lands, where use of a helicopter would necessarily require use of Federal lands for landing and takeoff, the state could land helicopters on its own land without obtaining any permission from BLM. This may well constitute an alternate form of access, but it is not one granted by BLM.

Based on this analysis, the relative incompleteness of BLM's helicopter study is a matter of no moment. It is clear that section 36 is landlocked by

Federal land. BLM has chosen a route designed to minimize the impairment that will occur. I believe that under the dictates of Utah v. Andrus, supra, BLM has no authority to refuse land access, regardless of whether or not helicopter access is feasible. Accordingly, I concur in the disposition of the instant appeal.

James L. Burski

Administrative Judge

February 26, 1986

IBLA 83-356	:	U-50162
80 IBLA 64	:	
91 I.D. 64	:	Right-of-Way Protest
	:	
UTAH WILDERNESS ASSOCIATION	:	
(ON JUDICIAL REMAND)	:	Vacated on Judicial Remand

ORDER

Pursuant to the order in Utah Wilderness Association v. Clark, No. C84-0472J (D. Utah, December 16, 1985), the decision of the Board in Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984) is vacated.

Franklin D. Arness
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

James L. Burski
Administrative Judge

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